QUESTION PRESENTED

During the years 1988-1993, when prison population reached statutorily set limits, Florida awarded inmates such as the petitioner provisional credits, a form of "gain time" intended solely to relieve prison overcrowding by reducing inmates' sentences. Between 1988 and 1991, the petitioner was given 1,860 days of provisional credits. Then, in 1992, the Florida Legislature revoked all provisional credits given to inmates like the petitioner, who had been convicted of violent crimes. Question: whether that revocation violated the ex post facto clause of the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

1. The petitioner, Kenneth Lynce.
2. Robert A. Butterworth, Florida Attorney General, respondent.
3. Hamilton Mathis, superintendent of Tomoka Correctional Institution, respondent.
4. Harry K. Singletary, secretary of the Florida Department of Corrections, respondent.

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In the Supreme Court of the United States

October Term 1995

No. 95-7452

KENNETH LYNCE,

Petitioner,

v.

HAMILTON MATHIS, ROBERT A. BUTTERWORTH
AND HARRY K. SINGLETARY,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT ROBERT A. BUTTERWORTH

STATEMENT OF THE CASE

This case began as a petition for a writ of habeas corpus challenging Florida's cancellation of 1,860 days of "provisional credits" given to a Florida prison inmate. These credits, if used by a prison inmate, can result in early release from sentence. They are widely regarded as a form of "gain time," a term for a variety of early release mechanisms, some of which are given to inmates as a means of behavior control. The particular type of gain time at issue in this action, however, had a special purpose: to enable state prison officials to prevent prison overcrowding

and to keep state prison populations under a cap mandated by a federal consent decree.

The petitioner is a prisoner in the custody of the Florida Department of Corrections (DOC). The respondents are the Florida Attorney General and two state prison officials responsible for operating a prison system that grew rapidly during the 1970s and 1980s to become one of the largest in the United States.

By October 1992, the petitioner had accumulated 1,860 days of these provisional or "overcrowding" gain time credits and was released. DOC released the petitioner and others like him based on its initial interpretation of 1992 amendments to the overcrowding gain time law that the petitioner retained the ability to use accumulated overcrowding gain time to secure early release. However, in December 1992, the Florida Attorney General determined that the 1992 Florida Legislature in fact had intended retroactively to revoke the petitioner's accumulated overcrowding gain time, an interpretation of the statute later upheld by the Florida Supreme Court. Because the petitioner had been unlawfully released, still having time remaining on his sentence, he was taken back into state custody.

On petition for a writ of habeas corpus alleging an ex post facto violation, the U.S. District Court for the Middle District of Florida (adopting the report and recommendation of a magistrate judge) determined that, in fact, the Florida Legislature's revocation of the petitioner's overcrowding gain time did not violate the U.S. Constitution's ex post facto clause.

The Eleventh Circuit Court of Appeals denied review.

This Court granted the petitioner's petition for a writ of certiorari in May 1996 to determine one question: whether the 1992 legislative cancellation of the petitioner's overcrowding gain time violated the ex post facto clause.

1. Overcrowding Gain Time — an Exercise in Prison Crisis Management.

During the 1970s and 1980s, the Florida prison system found itself under pressure from two directions. First, rising crime rates and increased in-migration drove up the number of crimes committed in the state and, therefore, the number of people sentenced to state prison by state courts. During the 1970s, state prison populations grew more rapidly than the state could build facilities to house them. For instance, between June 30, 1971, and May 12, 1975, the state prison population in creased by 43 percent, from 9,530 inmates to 13,700. *See Costello v. Wainwright*, 397 F.Supp. 20, 31 n. 9. (M.D. Fla. 1975), *aff'd* 525 F.2d 1239 (5th Cir. 1976). The DOC secretary three times temporarily closed the state prison system to new admissions. *Id.*, 397 F.Supp. at 31. During this period, the department temporarily housed inmates in tents at Florida's then-main prison at Starke. *Id.*, 397 F.Supp. at 22. The inmate population continued to rise, and as of August 21, 1996, there were 64,082 inmates in the Florida prison system — an increase of 570 percent over the number in June 1971.

Second, the state faced judicial pressure as well. Until this Court's decision in *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), it was widely assumed that prison overcrowding was a per se constitutional violation. Consequently, many inmate plaintiffs were quick to file civil rights actions alleging overcrowding. Florida was the target of such a lawsuit, and in 1975, finding that overcrowding threatened inmates' health and led to increased violence, the U.S. District Court for the Middle District of Florida issued a preliminary injunction ordering Florida to reduce its prison population. *Costello v. Wainwright*, 397 F.Supp. at 38.

Costello was a significant overcrowding case. Although it began in 1972 as a pro se challenge to the alleged failure to provide adequate medical and mental health care, it was amended to become an overcrowding class action after the district court appointed counsel to represent the plaintiffs. In 1979, the parties entered into a consent decree providing for a cap on inmate populations, which remained in place through

judicial order until 1993. *See Celestineo & Costello v. Dugger*, 147 F.R.D. 258, 264 (M.D. Fla. 1993).[1] This cap limited inmate populations based on square footage of living space per inmate bed. As part of the *Costello* termination process, the Legislature enacted the consent decree limitations into law. See note to s. 944.023, Florida Statutes (Supp. 1992).

Florida's first response to the *Costello* injunction was to build more prison beds. By June 1982, however, the problem of prison population growth had become so acute that the Florida Governor called a special legislative session to deal with it. During that session, the Florida Legislature appropriated additional prison building and operating funds, and ordered the creation of a task force to find other ways to keep inmate populations under the cap imposed by the *Costello* consent decree. Lodg. Doc. 76.

Among other things, the task force made three significant public policy recommendations. First, it proposed the creation of a system of sentencing guidelines. It was thought that, by making sentences more uniform, prison population growth could be more easily estimated. Second, the task force proposed changes to Florida's basic gain time statute, s. 944.275, Florida Statutes, which serves as a behavior management tool, again with the aim of making population growth more predictable. Lodg. Doc. 73, 112-113. Finally, the task force proposed the creation of an early release mechanism that would act as a "safety valve" in case the prison population could not be brought under control or predicted accurately. Lodg. Doc. 75.

In the years that followed, the Florida Legislature experimented with four "safety valve" overcrowding mechanisms. They were:

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[1] This is the same case as *Costello v. Wainwright*. The order cited terminated the case after 21 years, 14 of them under consent decrees.

- ***Emergency Release*** — Enacted in 1983,[2] this statute authorized the emergency release of inmates based on incremental reductions in gain time when overall prison populations reached 98 percent of capacity. See s. 944.598, Florida Statutes (1985). The statute did not condition access to credits based on the nature of the inmate's offense. Despite language that appears mandatory, Florida never granted inmates emergency release credits or released anyone pursuant to this statute. *Blankenship v. Dugger*, 521 So.2d 1097, 1098 (Fla. 1988).[3] After remaining on the books unused, the emergency release statute was repealed in 1993. Sec. 32, chapter 93-406, Laws of Florida.
- ***Administrative gain time*** — Enacted in 1987, administrative gain time provided that "Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary may grant up to a maximum of 60 days administrative gain-time equally to all inmates who are earning incentive gain-time, unless such inmates" were serving sentences for a short list of offenses. See s. 944.276, Florida Statutes (1987). The Legislature, however, repealed this section the following year, 1988, and

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[2] Sections 3 and 5, chapter 83-131, Laws of Florida.

[3] As of March 10, 1988, the date of the *Blankenship* opinion, neither DOC nor the Governor had "ever taken the steps necessary to activate the reduction of sentences under this section." This means that the petitioner never received emergency release credits. By March 1988, the second experiment in overcrowding gain time, known as administrative gain time, had been in place almost a year. *Id.* The petitioner received administrative gain time but does not challenge its cancellation in this case.

replaced it with provisional credits. Sections 5 and 6, chapter 88-122, Laws of Florida.

- ***Provisional Credits*** — Enacted in 1988,[4] s. 944.277, Florida Statutes, began with language almost identical to that in the repealed administrative gain time statute:

> Whenever the inmate population of the correctional system reached 97.5 percent of lawful capacity as defined in s. 944.096, the Secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except an inmate who . . ."

was serving a longer list of offenses than set out in the administrative gain time statute. The Florida Supreme Court saw no practical distinction between administrative gain time and provisional credits other than the name change. "The sole purpose of both was to reduce prison overcrowding when the correctional system reached ninety-eight percent of its lawful capacity." *Griffin v. Singletary*, 638 So.2d 500, 501 (Fla. 1994).

In 1989, the Legislature removed inmates convicted of murder and murder-related offenses from eligibility for provisional credits but did not revoke credits already distributed.

In 1992, balancing public safety concerns against the need for administrative flexibility to respond to overcrowding, the Legislature revoked all provisional "overcrowding" credits granted to the petitioner and others convicted of murder or murder-related offenses. See 1992 Op. Atty. Gen. Fla. 092-96 (December 29, 1992); *Griffin v. Singletary*, 638 So.2d 500 (Fla. 1994); *Waite v. Singletary*, 632 So.2d 192 (Fla. 3d DCA 1994).[5][6]

In 1993, the Legislature repealed s. 944.277 and canceled all previously granted administrative and provisional "overcrowding" credits. Sec. 32 and 35 chapter 93-406, Laws of Florida; section 944.278, Florida Statutes (1993).

- ***Control Release*** — Enacted in 1989,[7] s. 947.146, Florida Statutes, authorizes release from incarceration rather than decreases in sentence to control prison population. It works more like parole than gain time and cannot be considered a "gain time" measure. It also is the only population control mechanism to survive the experimentation of the 1980s and early 1990s.

These overcrowding relief mechanisms, particularly administrative gain time and provisional credits, should not be confused with "good time," or basic, gain time found in s. 944.275, Florida Statutes. Basic gain time was the type at issue in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). In *Weaver*, this Court concluded that basic gain time was part of the punishment or sentence and any reduction in its

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[4] Section 5, chapter 88-122, Laws of Florida.

[5] Florida's cancellation of release credits, after publication of a state attorney general's opinion that granting them was unlawful, is not an isolated phenomenon. The same situation occurred in *Stephens v. Thomas*, 19 F.3d 498 (10th Cir. 1994); *cert. denied*, — U.S. —, 115 S.Ct. 516, 130 L.Ed.2d 422 (1994)

[6] The petitioner implies (and one amicus argues) that the Attorney General's interpretation was wrong and that the Court should examine its correctness. However, that would be inappropriate. In *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), this Court said that, in a habeas corpus case, it was bound by the state court's interpretation of state statutes.

[7] Section 2, chapter 89-526, Laws of Florida

availability "had the purpose and effect of enhancing the range of available prison terms." *California Department of Corrections v. Morales*, — U.S. —, 115 S.Ct. 1597, 1602 (1995). Basic gain time, however, becomes part of the sentence because it operates differently from overcrowding gain time. Florida law provides that basic gain time comes off the top of the inmate's sentence upon arrival at the Florida DOC. Prison officials have no discretion whether to immediately grant this sort of gain time; its award is automatic. See *Weaver*, 450 U.S. at 26; s. 944.275(4)(a), Florida Statutes. And it can be taken away only for specific reasons. Sections 944.275(5)[8] and 944.278[9], Florida Statutes.

In contrast, overcrowding credits were not automatically awarded. Instead, they became available only upon the occurrence of an unpredictable and arbitrary event unrelated to the petitioner's original crime or his behavior in prison — the prison population exceeding a threshold percentage of system capacity. Whether the prison population hit the threshold depended on three factors, all of which are beyond the control of prison officials: 1) the rate of judicial commitments to prison, 2) the rate of discharges from prison based on normal completions of sentences (as defined by the sentencing order and basic gain time) and parole, and 3) the rate of prison construction. Even when populations hit the threshold, prison officials retained discretion in granting "overcrowding" gain time. For instance, the Governor could decline to acknowledge the DOC secretary's certification under the administrative and provisional release statutes. Under both such statutes, the

[8] Such as the failure to comply with the department's rules.

[9] Basic gain time is forfeited for escape or an attempt to escape, parole revocation, assault, threatening or knowingly endangering another's life, refusing to carry out an instruction, neglecting to perform a duty or work, violating any state law or rule of the department.

secretary had the discretion as to how much overcrowding gain time to give, ranging from zero to 60 days per inmate. This is a significant difference from basic gain time, where the Legislature prescribed the amount based on the length of the inmate's sentence.

2. The Proceedings Below.

On April 14, 1986, the petitioner pleaded guilty to attempted first degree murder, armed burglary of a dwelling, and possession of a firearm and was sentenced to 22 years in the Florida prison system.[10] J.A. 3, 33, 53. These crimes were committed on October 27, 1985. Lodg. Doc. 144-145.

Upon his arrival at DOC, the department deducted 2,640 days of basic gain time from the petitioner's sentence in accordance with section 944.275(4)(a), Florida Statutes (1985). J.A. 50. During his imprisonment, petitioner received an additional 958 days of incentive gain time under section 944.275(4)(b), Florida Statutes (1985). *Id.*

After the 1987 enactment of the administrative gain time statute, s. 944.276, the department allocated 335 days of administrative gain time to the petitioner. J.A. 50.

Between July 1988 and January 1991, after replacement of administrative gain time by provisional credits, the petitioner received 1,860 provisional overcrowding credits. J.A. 50.

In 1989, the Florida legislature amended the provisional credit statute, s. 944.277, to exclude inmates convicted of murder or attempted murder from eligibility for provisional credits. The limitation on eligibility applied prospectively only to offenders with crimes committed on or after January 1, 1990.

[10] Petitioner also pleaded to possession and delivery of cocaine in two additional cases and was sentenced to three and one-half years in each case. J.A. 49, 50. However, because the petitioner's release date is controlled by the 22-year term, these sentences are not the subject of this proceeding.

Section 6, chapter 89-100, Laws of Florida. In 1992, the Legislature again amended s. 944.277, reenacting the elimination of eligibility for murder-related offenses, but without making that ineligibility prospective.[11]

The lack of language making ineligibility prospective caused confusion. The Florida Department of Corrections initially interpreted the 1992 amendment to require them to continue releasing inmates such as the petitioner based on accumulated provisional credits. Therefore, the department released the petitioner on October 1, 1992. J.A. 50.

However, in December 1992 questions were raised about the department's statutory authority to release, pursuant to provisional credits, inmates like the petitioner who had been convicted of a murder-related offense. In that month, at the request of the secretary of DOC and other state officials, the Florida Attorney General interpreted s. 944.277 and its 1992 amendments and concluded that the offense-based exclusions contained in s. 944.277(1)(h) and (i) applied retroactively effective July 6, 1992, to exclude from eligibility for provisional credits all inmates who committed murder-related offenses before the law's enactment — and to require retroactive cancellation of all provisional overcrowding credits previously allocated. (Later the Florida courts affirmed this interpretation of DOC's statutory authority. *Griffin v. Singletary*, 638 So.2d 500 (Fla. 1994); *Waite v. Singletary*, 632 So.2d 192 (Fla. 3d DCA 1994).) DOC immediately canceled all provisional credits allocated to offenders covered by the 1992 exclusions.

After publication of the Attorney General's opinion, DOC realized that it had unlawfully released some inmates like the petitioner because revoked credits had been counted toward their release dates. Therefore, the department sought a warrant for the petitioner's return to custody. J.A. 51. On May 17, 1993, a state court issued a warrant for the petitioner's arrest,

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[11] Section 944.277(1)(i), Fla. Stat. (Supp. 1992).

and he was returned to custody on June 8, 1993, to complete the remainder of his sentence. J.A. 51.

On August 18, 1994, the petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. J.A. 2-29. The petitioner alleged that the retroactive cancellation of the provisional credits under the 1992 amendments to s. 944.277(1) violated the ex post facto clause, Article I, Section 10, clause 1, of the United States Constitution. *Id.* The petitioner argued that the revocation of overcrowding, or provisional release, credits previously allocated to him and his return to custody was an unconstitutional increase in the punishment for a crime after its commission. J.A. 22-25.

The respondents opposed the petition, citing a line of state and federal cases standing for the proposition that the overcrowding release statutes were procedural in nature. They argued that overcrowding gain time was procedural because its sole purpose was to provide an orderly mechanism to alleviate the administrative crisis of prison overcrowding not to the traditional purposes of punishment. J.A. 44-46.

On March 14, 1995, a United States magistrate judge recommended that the petition be denied and dismissed with prejudice on the ground that the 1992 amendments to section 944.277(1) were adopted merely as a means to relieve prison overcrowding, and, therefore, were not subject to the prohibitions of the ex post facto clause. J.A. 53-60. The magistrate judge relied on *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert. denied*, — U.S. —, 116 S.Ct 715 (1996). *Id.* On May 10, 1995, the district court adopted the magistrate's report and recommendation, and denied the petition. J.A. 64. Petitioner applied for a certificate of probable cause on June 8, 1995, which the district court denied on June 16, 1995. J.A. 65. The petitioner reapplied for a certificate of probable cause to the United States Court of Appeals for the Eleventh Circuit, which was denied on October 16, 1995. J.A. 66. On January 10, 1996, petitioner filed with this Court a petition for writ of

certiorari. J.A. 67. On May 13, 1996, the Court granted certiorari. J.A. 67.

SUMMARY OF ARGUMENT

This case requires the Court to determine whether elimination of an inmate's ability to use a special type of gain time, which was intended solely to relieve prison overcrowding, in order to secure early release violates the U.S. Constitution's ex post facto clause. In this case, the 1992 Florida Legislature revoked "overcrowding" provisional credits given to the petitioner and others like him who had been convicted of violent crimes.

During the 1980s, in response to rapidly increasing prison populations in a prison system under a consent decree establishing a population cap, the Legislature gave executive branch officials the discretion to reduce the sentences of state prison inmates when prison populations threatened to exceed the cap. Never quite satisfied with the balance struck between public safety and responsible prison management, the Legislature amended overcrowding gain time, formally known as provisional credits, eliminating the ability to use such gain time for classes of inmates such as the petitioner. And finally in 1993, the Legislature revoked all inmates' overcrowding gain time.

The Florida Legislature's actions did not violate the petitioner's constitutional rights or increase his punishment. First, the overcrowding gain time statute under which the petitioner received credits did not exist at the time of his offense, October 1985. Therefore, it cannot be considered part of the range of potential punishment to which he could be subjected, because the ex post facto clause looks at the range on the day of the offense.

Second, overcrowding gain time was a remedial measure whose *sole* objective was to enable prison officials to control

inmate population levels and to maintain compliance with a federal consent decree capping prison populations. It was never intended to be part of the petitioner's sentence or punishment. Because of the strictly remedial nature of the overcrowding gain time statute and the administrative problem it addressed, because receipt of overcrowding credits was contingent upon the occurrence of events outside the petitioners' and the respondents' control, and because the statute provided no expectation or entitlement, the petitioner had "fair warning" that overcrowding gain time did not constitute part of the range of available punishments to which he could be subjected. Thus, the Legislature's revocation of the petitioner's overcrowding credits did not enhance the range of punishment available at the time of the commission of his crime. Instead, it only eliminated an opportunity for early release and did not alter the definition of the punishment to which the petitioner was susceptible.

Since the Florida Legislature did not alter the definition of the petitioner's potential punishment, its revocation of his overcrowding credits did not violate the Constitution's ex post facto clause.

In addition, the Court should defer to the Florida Legislature's judgment about the handling of prison overcrowding. The provisional overcrowding credit statute was reasonably related to a legitimate penological interest in maintaining security and promoting inmates' health and welfare. As such, the decision to revoke the credits is entitled to judicial deference. The Court will show such deference if it regards elimination of the petitioner's provisional overcrowding credits as merely the loss of an opportunity for early release that does not trigger ex post facto protection.

ARGUMENT

I. REVOCATION OF THE PETITIONER'S OVERCROWDING CREDITS DID NOT VIOLATE THE CONSTITUTION'S EX POST FACTO CLAUSE

BECAUSE THEY DID NOT FORM PART OF THE PUNISHMENT TO WHICH HIS CRIME WAS SUSCEPTIBLE.

A. ***Revocation of the petitioner's overcrowding gain time credits did not violate the ex post facto clause because, at the time of his offense, overcrowding gain time did not exist.***

The legislative history makes evident a surprising fact: the statutes by which the petitioner received overcrowding gain time did not exist on the date of his offense.

The petitioner's offense occurred on October 27, 1985. Lodg. Doc. 144-145.

He did not get emergency release credits, since such credits were never given, *Blankenship v. Dugger*, 521 So.2d 1097, 1098 (Fla. 1988), and the Florida Legislature did not enact the second overcrowding gain time statute until 1987, or the third (the loss of which the basis of his claim) until 1988.

Thus, the overcrowding gain time credits the petitioner received came under a statute enacted after the date of his offense.

One essential purpose of the ex post facto clause is to prohibit the state from increasing a convicted person's potential range of punishment as it stood *on the date of the offense*. *Weaver v. Graham*, 450 U.S. at 28, 30-31 ("Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense."); *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 2719 (1990) (citing *Calder v. Bull*, 3 Dall. 386, 390 (1798)).

In this case, overcrowding gain time cannot be a part of the petitioner's potential punishment because the provisionional credit, or overcrowding gain time, statute did not exist in October 1985. Revocation of his overcrowding gain time, instead of increasing his punishment, simply returned him to the same position in which he stood in October 1985. (The petitioner attacks *Hock v. Singletary,* on which the lower courts relied, as wrongly decided. However, *Hock* involved identical ultimate facts: the inmate challenged retroactive application of Florida's control release statute, which took effect *after* he was incarcerated. Although approaching the issue from the slightly different angle, the Eleventh Circuit concluded there was no ex post facto violation because retroactive application did not affect "the quantum of punishment imposed." *Hock*, 41 F.3d at 1472.)

The ex post facto clause does not bar Florida from giving what amounts to after-the-fact clemency to address overcrowding and then revoking it when conditions change. Such actions do not "enhanc[e] the range of available prison terms" or "'impose additional punishment to the term then prescribed'" in October 1985, the date of the petitioner's offense. *California Department of Corrections v. Morales*, 115 S.Ct. at 1602; *Weaver v. Graham*, 450 U.S. at 28. Whatever one might feel about the wisdom of the public policy decisions Florida made dealing with prison overcrowding, they were Florida's to make, uninhibited by the ex post facto clause, given the facts of this case.

For this reason alone, the Court should affirm the decision below.

B. ***Florida's revocation of the petitioner's overcrowding gain time credits did not violate the ex post facto clause. Overcrowding gain time did not form part of the petitioner's potential punishment because the statute provided fair warning that it was not part of the range of punishments to which he was exposed.***

Even if the provisional overcrowding credits statute existed on the date of the petitioner's offense, it still did not form part of the potential punishment for his crime because the statute provided fair warning that it was not included in the penalty.

One of the fundamental purposes of the ex post facto clause is to ensure that citizens have fair warning of the nature of a given crime and its potential punishment. *Weaver v. Graham*, 450 U.S. at 28; *Dobbert v. State of Florida*, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977); *Marks v. U.S.*, 430 U.S. 188, 191, 97 S.Ct. 990, 992, 51 L.Ed.2d 260 (1977).

The thrust of *Marks v. U.S.* is that due process fair warning cases provide guidance in the interpretation of the fair warning component of the ex post facto clause. In *Marks*, the Court said that "the principle on which the Clause is based — the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties — is fundamental to our concept of constitutional liberty." *Id.*, 430 at 191. The Court went on to say that the same right to fair warning "is protected against judicial action by the Due Process Clause of the Fifth Amendment." *Id.*, at 192. Thus, the Court held that judicial interpretation of a criminal statute retroactively applying hard core pornography standards to impose criminal liability violated the due process clause in the same way as a retroactive legislative enactment violated the ex post facto clause. See also *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). In a word, fair warning concerns were the same under either clause. Therefore, since fair warning operates the same way under the due process and ex post facto clauses, the cases arising under one clause should apply to those falling under the other.

The "due process fair warning" doctrine arose from cases dealing with criminal statutes challenged as unconstitutionally vague. See, for example, *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); and *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126 (1926). The requirements of fair warning, which are rooted in "a rough

idea of fairness," *Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972), are straightforward: The statute must be clear enough that a person of common intelligence can determine what is, or is not, proscribed. *Connally v. General Construction Co.*, 269 U.S. at 391[12]; *Grayned v. City of Rockford*, 408 U.S. at 108. Thus, this Court requires that fair notice demands "explicit standards." *Grayned, supra; but see U.S. v. Smith*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974) (requiring reasonably clear guidelines). Where one must guess at a statute's meaning, where different people are reasonably likely to get varying impressions as to the statute's meaning, where one must speculate about its applicability, or where the statute is subject to arbitrary or erratic application, the statute lacks the required fair notice. *Connally v. General Construction Co.*., 269 U.S. at 391, 395; *Bouie v. City of Columbia*, 376 U.S. at 351 ("[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."); *Colautti v. Franklin*, 439 U.S. 379, 390, 99 S.Ct. 675, 683, 58 L.Ed.2d 596 (1979) (fair notice is lacking where a statute "is so indefinite that 'it encourages arbitrary and erratic arrests and convictions.'").

Vulnerability to arbitrary application is an important factor. In *U.S. v. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 (1921), this Court was presented with the question whether a section of the Lever Act, a wartime measure

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[12] "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

regulating the sale of food, was unconstitutionally vague. The precise language at issue was "made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . ." The court concluded that the phrase was unconstitutionally vague because what constituted an unreasonable rate or charge varied with economic conditions. *Id.*, 255 U.S. at 90 n. 2. Because "unreasonable rates" depended on "the vagaries of supply and demand, factors over which [the defendant] had no control,"[13] Mr. Cohen could have no idea what conduct was proscribed.

In the present case, we are not concerned with the definition of criminal behavior. Rather, we are concerned with the question of what fair warning Florida statutes gave of the prescribed punishment for the petitioner's crime. Thus, the fair warning doctrine, applied to the definition of punishments, can be stated: whether a person of common or reasonable intelligence would know that a particular statute was part of the "range of available prison terms" for the petitioner's crime. To reach the answer, one must ask: Is the statute which is the target of the inquiry explicitly included? Must one speculate or guess as to its applicability? Is the statute subject to arbitrary or erratic application?

Although the court has rejected an entitlement or vested rights analysis for ex post facto claims, *Weaver v. Graham*, 450 U.S. at 29 n. 13, one might easily summarize all the questions in the preceding paragraph as: do Florida statutes create a reasonable expectation that the petitioner's sentence will be reduced by overcrowding gain time? Questions about explicit inclusion, speculation or guesswork about applicability, and arbitrary or erratic enforcement can be rolled together in this way because they all have, at their heart, an assumption about reasonable expectations.

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[13] *U.S. v. Powell*, 423 U.S. 87, 92-93, 96 S.Ct. 316, 320, 46 L.Ed.2d 228 (1975).

In this case, the petitioner lacked any reasonable expectation of overcrowding credits. As the Eleventh Circuit noted in *Hock v. Singletary*, 41 F.3d at 1472-1473, overcrowding release "is based on an arbitrary and unpredictable determinant, the prison population level [so] an inmate has no reasonable expectation at the time he is sentenced that the prison population will reach the specified triggering level and that his incarceration will therefore be reduced." The unpredictability, dependency on an essentially arbitrary event, and erratic application of overcrowding gain time distinguish it from basic gain time, whose award is automatic and predictable in amount. *Id.*, 41 F.3d at 1473.

Moreover, eligibility for provisional overcrowding credits depends on the occurrence of other unpredictable events. The Governor had to concur that there was an overcrowding crisis. There is nothing in the statute requiring him to concur. Section 944.277(1), Florida Statutes (Supp. 1992). Furthermore, the amount of provisional overcrowding credits the petitioner could get was subject to the discretion of the DOC secretary, who could award between zero and 60 days.

Thus, because the availability of provisional overcrowding gain time was erratic and subject to unpredictable fluctuations in prison population and to the discretion of the Governor and the secretary, the petitioner had no reasonable expectation that he would get any credits. Lacking this reasonable expectation, he had fair warning that overcrowding gain time was not a part of the range of available punishment for his crime. Since the petitioner had fair warning that provisional overcrowding gain time was not part of the range of available punishment, revocation of that gain time did not offend the ex post facto clause.

C. *Anticipating early release because of overcrowding was too subjective an expectation to justify ex post facto protection.*

The petitioner argues that he reasonably expected to get provisional overcrowding credits at the time he pleaded guilty, so they should be regarded as part of his sentence. Petitioner's brief at 32-35. He bases his reasonable expectation on two points. First, he contends that because the prison system's population was "burgeoning" an award of overcrowding credits was a "near certainty". As a near certainty, he implies that he contemplated, at the time of his guilty plea, that he would receive early release because of prison overcrowding. (He provides no evidence that he actually so contemplated, however.)

The petitioner cannot have anticipated receiving provisional overcrowding credits because the provisional credit statute did not exit in April 1986, when he pleaded guilty.

Assuming that the statute existed at the time of his plea, if the petitioner truly anticipated early release because of overcrowding at the time of his plea, that expectation was speculative. His thinking is like that of a Wall Street trader, who says to himself, "The market is going up, therefore I'm sure to make a profit." In fact, we recognize such thinking as mere speculation, a wish dependent on social and economic factors outside anyone's control. As we know, the market can suddenly go down, as well as up, and upward trends often are interrupted by dives.

Suppose, for example, that after the petitioner's plea, the Florida Legislature had decided to embark on a bigger prison building program during the 1980s (rather than spending money on schools and roads). Or suppose that under the existing building program a prison was opened after his plea, reducing prison populations below the cap. In either situation under the petitioner's theory, his expectation would still be reasonable because no building program existed at sentencing to disrupt his expectation. The petitioner's theory forces the Court to examine prison conditions, legislative appropriations, the prison building program, prison population trends, the rate of prison releases and other factors as they stood *on the day of sentencing* for any

inmate with an overcrowding gain time complaint to determine whether the inmate's expectation was reasonable. The need for such a day-by-day examination of a variety of fluctuating factors exposes the speculative nature of the expectation. Being merely speculative, the petitioner's expectation is subjective.

Like the Eleventh Circuit in *Hock v. Singletary,* the Florida Supreme Court pointed out the inherently speculative nature of provisional overcrowding credits:

> [T]he state's unilateral decision to restrict the "provisional credit" does not trigger the constitutional issues that would be present if some other forms of credits or gain time were at stake. The reason is that provisional credits are not a reasonably quantifiable expectation at the time an inmate is sentenced. Rather, provisional credits are an inherently arbitrary and unpredictable possibility that is [sic] awarded based solely on the happenstance of prison overcrowding. Thus, provisional credits in no sense are tied to any aspect of the original sentence and cannot possibly be a factor of sentencing or in deciding to enter a plea bargain.

Griffin v. Singletary, 638 So.2d at 501

Even the notion that one should examine the petitioner's expectation on the day of sentencing is flawed. Under the ex post facto clause, the critical date is not the date of the sentencing or of the plea, but the date of the offense. *Weaver*, 450 U.S. at 28, 30-31.

Second, the petitioner contends that there was no more speculation involved in the receipt of overcrowding gain time than there was in the receipt of basic gain time. The structure of these very different statutes disproves the point. The award of basic gain time is automatic upon commitment to DOC. Section 944.275, Florida Statutes. Basic gain time comes right off the top of the sentence imposed by the state court, yielding a release date by simple arithmetic: Judge's sentence - basic gain time

(less time lost for disciplinary infractions) = release date. See *Griffin v. Singletary*, 638 So.2d at 501.[14] Not so overcrowding gain time, which required a surge in prison population above a specified threshold of prison bed space, a notification of that event to the Governor by the DOC secretary, a written acknowledgment by the Governor (which he was not required to give if, for some reason, he thought overcrowding releases would be improvident) and, finally, the decision by the secretary as to how much overcrowding gain time to award inmates. See s. 944.277, Florida Statutes (1988 Supp., 1989 and Supp. 1992). In short, overcrowding gain time was contingent upon the happening of several events. Basic gain time is not contingent. *Griffin v. Singletary, supra*.

Nonetheless, *Weaver v. Graham* offers some support for an argument that if "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed," *id.*, 450 U.S. at 32, it should enjoy ex post facto protection. The *Weaver* Court used this possibility as a reason to avoid determining whether basic gain time was actually a part of the punishment at the time of sentencing, implying that such a decision was unnecessary.

The Court should recede from this part of *Weaver*. It is out of step with *Morales'* tight focus on the actual penalty and looks instead to "disadvantage" and "opportunity for early release" considerations *Morales*[15] and *Collins* rejected. It is also inconsistent with the underlying ex post facto principle that the critical date is the date of the offense. In addition, it injects a

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[14] The court said that under Florida law, incentive and basic gain time were markedly different from provisional credits. "These kinds of gain time were reasonably quantifiable at the time of sentencing and thus were a factor that could be taken into account in deciding to enter a plea bargain."

[15] *Morales*, 115 S.Ct. at 1602 n. 3.

subjective and often speculative element into the analysis. The Court should be wary of tying fundamental constitutional limitations on state action to the subjective speculations of criminal defendants at sentencing time.

D. *Revocation of the petitioner's overcrowding gain time amounted only to loss of an opportunity to take advantage of provisions of early release.*

In recent years, ex post facto law had gone astray. In *California Department of Corrections v. Morales* and *Collins v. Youngblood*, this Court made a course correction. The Court said that the sole focus of an ex post facto inquiry is not whether someone has suffered a disadvantage or lost an "'*opportunity* to take advantage of provisions for early release,'", but "whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Morales*, 115 S.Ct. at 1602 n. 3 (emphasis the Court's).

Provisional overcrowding gain time was not part of the penalty by which the petitioner's crime was punishable. Thus, revocation of his overcrowding gain time represented only the loss of an opportunity to take advantage of provisions of early release, a deprivation which should not offend the Constitution.

Citing *Weaver*, the petitioner urges the Court to consider revocation of the opportunity to secure early overcrowding release as an *increase* in his sentence. There is a logical discontinuity here, which the *Morales* Court apparently sensed. It is hard to see how the loss of an opportunity to decrease a sentence imposed by the court (as automatically modified by basic gain time) actually results in an increase.

As *Morales* implies, it is fair, sensible, good public policy and consistent with the ex post facto clause to treat overcrowding gain time for what it is, a form of clemency, granted at the state's discretion, that constitutes only an opportunity for early release and is not part of the petitioner's actual sentence. Since it is not part of the actual sentence,

removing the opportunity does not *increase* the sentence. In reality, the sentence remains unchanged.

II. THE 1992 REVOCATION OF THE PETITIONER'S OVERCROWDING GAIN TIME CREDITS DID NOT OFFEND THE POLICIES UNDERLYING THE EX POST FACTO CLAUSE.

As the petitioner points out, this Court has identified three policy considerations underlying the ex post facto clause:

1. To restrain the national and state legislatures from enacting arbitrary or vindictive legislation. *Miller v. Florida*, 482 U.S. 423, 429, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987);
2. To provide fair warning of the elements of a crime and the nature of its punishment. *Id.*, 482 U.S. at 430; and
3. To "uphold[] the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing law." *Weaver v. Graham*, 450 U.S. at 29 n. 10.

None of these policies were offended by the 1992 revocation of the petitioner's overcrowding gain time.

First, the 1992 amendment eliminating overcrowding gain time for the petitioner was neither arbitrary nor vindictive. It did not single him out personally, like a bill of attainder. It did not increase his punishment from that in effect on the day he committed his crime. Indeed, the Florida Legislature did not intend its overcrowding enactments to be a form of punishment. It acted solely to address a pressing issue of prison management to give prison officials the statutory tools they needed to keep prison populations under a federally mandated cap. In doing so, the Legislature had to balance issues of inmate rights under a federal consent decree and the Eighth Amendment against public safety. As often happens, the balance was not struck immediately. The scale wobbled in one direction and the other until it steadied. The Florida Legislature's action must be seen

in that light, not as a vindictive, arbitrary act. Eliminating the eligibility of violent offenders to gain early release due to prison crowding was a reasonable act. See *Keeton v. State of Oklahoma*, 32 F.3d 452, 453 (10th Cir. 1994).

We have already dealt above with the second ex post facto policy.

On the third point, separation of powers, the petitioner argues that revocation of overcrowding gain time injects the Legislature into the sentencing process in violation of separation of powers principles. While maintaining separation of powers between courts and legislatures is, in our system, a fundamental constitutional goal, it is not the province of the federal courts to police the forays of state legislatures into the domains of state courts. There is no *federal* constitutional prohibition against state legislative invasions of the powers of their local courts. Rather, these are questions of *state* law, which should be remedied in the state courts under state constitutional limitations. A federal court should only concern itself with the effect of legislative action, which is the objective of *Morales'* tight focus on whether an enactment retroactively increased the punishment for a crime after the date of its occurrence.

In any event, Florida's revocation of overcrowding gain time did not offend separation of powers principles. In Florida, state executive branch officials can act only pursuant to constitutional or statutory authority. *State ex. rel. Smith v. Jorandby*, 498 So.2d 948 (Fla. 1986). State prison officials have no power to release inmates to control prison populations without statutory authority. In order to control prison populations, the Florida Legislature made a policy judgment that such authority was necessary. Later, it made a similar policy judgment that part of that grant of authority was improvident and withdrew it. Neither act involved interference in the petitioner's actual sentence or trampled on executive or judicial branch prerogatives.

III. THE COURT'S PRISON DEFERENCE CASES AND FEDERALISM AND COMITY CONCERNS

REQUIRE THE COURT TO AFFIRM THE DECISION BELOW.

In other cases involving inmates' fundamental rights, this Court has applied a standard designed to take into account the deference and restraint federal courts should exercise when reviewing challenges to the constitutionality of regulations governing prison management. *Thornburgh v. Abbott*, 490 U.S. 401, 407-408, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987).

Since provisional overcrowding credits are intended solely for prison management, there is no reason why this Court should not employ a deference-tempered standard here. The failure to do so is inconsistent with the deference this Court traditionally accords states' efforts to cope with the difficult job of prison management. See *Lewis v. Casey*, — U.S. —, 116 S.Ct. 2174 (1996); *Turner v. Safely*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). In matters dealing with prison management, this Court has said in these cases that federal courts should defer to the judgment of prison officials if the challenged policy or practice is reasonably related to a legitimate penological interest. *Turner*, 482 U.S. at 89, 107 S.Ct. at 2261 ("when a prison regulation impinges in inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if 'prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations."); *Procunier v. Martinez*, 416 U.S. 396, 404-405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974) (deference to prison administrators' decisions was appropriate because judicial involvement in the details of prison management was beyond the

competence of the courts and these state officials were in a better position to make the delicate judgments that prison management requires.). The central issue in *Turner* was whether the Court should adopt a strict scrutiny or a rational basis test for reviewing challenges to prison regulations addressing legitimate penological interest. Opting for a standard that incorporated appropriate deference, the Court rejected strict scrutiny because applying that test to "day-to-day judgments" of prison officials "would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* (In the Court's deference cases, strict scrutiny was a rigid, narrow, difficult test. It is not unlike the rigid, narrow ex post facto test the petitioner proposes — the loss of an opportunity to subtract a day off time served amounts to an increase in his sentence and, therefore, an ex post facto violation.)

The Court's deference cases also involved challenges to executive branch policies. However, there is no reason why the Court should not defer to a prison policy enacted by a state legislature. It is, after all, the job of legislatures to establish prisons, to set the policies by which they are run, and to delegate authority to the executive branch to carry those policies out. Legislatures are a step removed from direct operation, but since they are still directly involved in the setting of prison policies and prison operation, they must consider the same minutia as the executive branch and are better positioned than courts to make the delicate judgments that prison management requires. In fact, in *Turner*, this Court recognized that legislative acts concerning prison management may be entitled to deference. *Id.*, 482 U.S. at 84-85 ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the *Legislative* and Executive Branches of Government. Prison administration is, moreover, a task that has been committed to the responsibility of *those* branches, and separation of powers concerns counsel a policy of

judicial restraint." Emphasis added.)[16]. Therefore, legislative decisions that are rationally related to a legitimate penological interest should be given the same degree of deference.

Provisional, or overcrowding, credits are rationally related to legitimate penological interests. One such interest is internal security, the central issue of prison management. *Pell v. Procunier*, 417 U.S. at 823, 94 S.Ct. at 2804. When the district court in *Costello* issued its preliminary injunction ordering reductions in Florida's prison population because of overcrowding, it concluded based on the facts presented that there was a relationship between overcrowding and the risk of inmate assaults. *Costello v. Wainwright*, 397 F.Supp at 38. Certainly prevention of violence is an internal security matter. The district court also concluded that, based on the facts presented, overcrowding in Florida's prisons affected inmate health and general welfare. *Id.* Therefore, controlling prison population and preventing overcrowding is a legitimate penological interest. See also *Keeton v. State of Oklahoma*, 32 F.3d 451, 452 (10th Cir. 1994) ("We agree with the district court that the state has a legitimate interest in reducing prison overcrowding and thereby diminishing the many attendant difficulties related to overcrowding."); *Shifrin v. Fields*, 39 F.3d 1112, 1114 (10th Cir. 1994) (Oklahoma's analogue to provisional overcrowding credits was rationally related to a legitimate penological interest).

Providing early release mechanisms, such as provisional overcrowding credits, is rationally related to these interests. They allow a direct way of reducing the inmate population.

It is also reasonable and serves legitimate penological interests to release one class of inmates based on the nature of their crime and not another. See *Keeton v. State of Oklahoma*,

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[16] *Turner*, however, did not involve a legislative policy. Turner challenged Missouri Division of Corrections rules governing inmate correspondence and marriage.

32 F.2d at 452 ("the state has a legitimate interest in designating that only prisoners who have been convicted of lesser crimes or who are subject to no higher than medium security may be released so as to avoid a greater threat to society." Therefore, Oklahoma's analogue to provisional overcrowding credits was constitutional.); *Shifrin v. Fields*, 39 F.3d at 1114.[17]

Therefore, the Court should not invalidate Florida's revocation of the petitioner's provisional overcrowding credits. Rather, it should view revocation as merely the elimination of an opportunity to enjoy early release from prison which does not trigger the ex post facto clause. Such a test is consistent with the Court's objective in *Turner* to fashion "a standard of review of prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" *Id.*, 482 U.S. at 85.[18]

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[17] "The district court correctly determined that Appellant failed to make a viable argument that excluding inmates from emergency time credits because of their status as violent or repeat offenders violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment."

[18] Given the evolution of deference doctrine as reflected in *Turner*, the Court may wish to reexamine the reasoning and the result in *Weaver v. Graham*. A case can be made that the deference doctrine, which wasn't considered in *Weaver*, requires the federal courts to uphold retroactive changes in basic gain time against an ex post facto challenge. Whether basic gain time, the kind at issue in *Weaver*, is part of the punishment or represents an opportunity for early release, like provisional overcrowding gain time, is a close question. Basic gain time can easily be regarded more as an opportunity for early release and a behavior management tool than as a part of the sentence. Furthermore, basic gain time reasonably serves the legitimate penological interest of security maintenance because, as a behavior management tool, it preserves prison security.

If the Court fails to afford this degree of deference, it will stifle the sort of innovative management experimentation it sought to protect in *Turner*.

Comity and federalism concerns also militate against interference in Florida's efforts to control its prison population.[19] Management of state prisons is a fundamental exercise of state sovereignty. The ability to control population size is an important management tool. If the Court decides that overcrowding gain time falls under the ex post facto clause, it will significantly and unreasonably limit Florida's ability to manage its prisons, without having furthered the underlying purposes of the ex post facto clause.

CONCLUSION

For these reasons, Respondent Butterworth asks the Court to affirm the decision below.

RESPECTFULLY SUBMITTED,

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[19] "Where a state penal system is involved, federal courts have . . . additional reason to accord deference to appropriate prison authorities." *Turner*, 482 U.S. at 85.